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Supreme Court, U.S.
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No. 03-465

IN THE

Supreme Court of the United States

Sabate S.A. and Sabate U.S.A., Inc.,
Petitioners,

v.

Chateau des Charmes Wines Ltd.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

SUGGESTION OF MOOTNESS

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SUGGESTION OF MOOTNESS

Petitioners Sabate S.A. and Sabate U.S.A., Inc. respectfully suggest that the appeal underlying their petition for certiorari is moot as a result of the dismissal of this action by the district court. See Nov. 10, 2003 Opinion (filed contemporaneously herewith), at 1-14.

1. The petition arises from a complaint filed by respondent Chateau des Charmes Wines Ltd. against petitioners in the federal district court for the Northern District of California. Respondent alleged state law claims for breach of express warranty, breach of implied warranties, breach of contract, misrepresentation, strict liability/negligence, and violation of California's false advertising and deceptive practices statutes.

The district court initially dismissed the complaint based on a forum selection clause in the parties' written contracts. See Pet. App. 7a-17a.

On respondent's appeal, the Ninth Circuit reversed. The court of appeals *sua sponte* held that the contracts were governed by a treaty to which the United States had subscribed, the United Nations Convention on Contracts for the International Sale of Goods (CISG). See *id.* 3a-4a. The court further held that, under that treaty, the material terms of the written contracts were not part of the parties' agreement. See *id.* 5a-6a.

The petition for certiorari challenges the Ninth Circuit's determination that the validity of the forum selection clause is governed by the CISG (see Pet. 5-6), as well as its determination that the material written terms are invalid under the CISG (see *id.* 7-12).

2. During the pendency of the petition, proceedings have continued in the district court. On November 10, 2003, the district court granted petitioners' motion to dismiss the complaint on the ground of forum non conveniens. See Opinion, at 1, 14. The district court specified that respondent

could pursue its dispute with petitioners by filing a new action in the courts of Canada or France. *Id.* at 14.

3. The instant appeal is moot. As the case stands, respondent's complaint has been dismissed. Petitioners obviously have nothing to gain through the appeal that is the subject of the petition for certiorari, which ultimately seeks the same result. Relatedly, respondent obviously cannot prevail on its now-dismissed complaint. The district court's dismissal order therefore necessarily renders the proceedings in this Court moot. "To adjudicate a cause which no longer exists is a proceeding which this Court uniformly has declined to entertain." *Sears, Roebuck & Co.* v. *Carpet, Linoleum, Soft Tile & Resilient Floor Covering Layers*, 397 U.S. 655, 657 (1970) (numerous citations omitted).

4. Because the petition presents a substantial legal question, this Court should not merely deny certiorari but instead should act on the petition in a fashion that accounts for the fact that the case has become moot. "The established practice of the Court in dealing with a civil case from a court in the federal system which has become moot while on its way here or pending our decision on the merits is to reverse or vacate the judgment below and remand with a direction to dismiss." *United States* v. *Munsingwear, Inc.*, 340 U.S. 36, 39 (1950). Indeed, "it is the duty of the appellate court to set aside the decree below and to remand." *Duke Power Co.* v. *Greenwood County*, 299 U.S. 259, 267 (1936).

Two factors make that course particularly appropriate in this case. *First*, a principal reason for vacatur is that the party deprived of the opportunity to secure further review (here, petitioners) not be prejudiced by the invocation of the decision against it in later litigation. "Vacatur 'clears the path for future relitigation' by eliminating a judgment the loser was stopped from opposing on direct review." *Arizonans for Official English* v. *Arizona*, 520 U.S. 43, 71 (1997) (quoting *Munsingwear*, 340 U.S. at 40). That generally abstract prospect is *concrete* in this case. Respondent has already

advised petitioners that it will regard the Ninth Circuit's holding with respect to the CISG as binding when it files a new complaint in Canada or France.

Second, the judgment has adverse consequences well beyond the parties to this single case. The Ninth Circuit held that, in the frequently recurring circumstance in which a purchaser of goods in international commerce places an oral order, subsequent material terms in a writing by the seller are unenforceable. See Pet. App. 5a-6a. That rule invalidates forum selection and arbitration clauses in invoices and letters of confirmation that follow oral orders. As discussed in the petition, that holding is disruptive to commerce because the contrary rule applies not only in other CISG signatory states but also in the United States with respect to domestic sales. See Pet. 10-12; *id.* 6-7.

Such a dramatic departure from practice and precedent ought not be sanctioned lightly. Yet, as respondent emphasized in opposing certiorari, the Ninth Circuit reached its decision *sua sponte*. See BIO 10-11. Respondent contended that this fact makes this case an inappropriate vehicle in which to decide such an important question. Although petitioners pointed out that the fact that the court of appeals decided the issue without full consideration was hardly a ground for insulating its ruling from review (see Cert. Reply 8-9), the relevant point is that both petitioners and respondent agree that the court of appeals decided the case without the benefit of thorough analysis by the parties.

5. Ordinarily, in these circumstances, the Court vacates the judgment and remands the case with instructions to dismiss the case as moot. See *Munsingwear*, *supra*. Petitioners acknowledge, however, that a circumstance could arise in the case in which vacatur could prejudice respondent unfairly. It is possible that respondent will persuade the district court or the Ninth Circuit to reverse the order of dismissal. That is doubtful, given that the appeal will be decided on an abuse of discretion standard. See *American*

Dredging Co. v. *Miller*, 510 U.S. 443, 455 (1994); *Creative Tech., Ltd.* v. *Aztech Sys. PTE*, 61 F.3d 696, 699 (CA9 1995). Indeed, the Ninth Circuit has reversed in only two of twenty-four forum non conveniens appeals in the past ten years.[1]

Nonetheless, reversal is a hypothetical possibility, and it would render the case no longer moot. The appropriate course in that circumstance is for this Court to remand the case to the court of appeals for consideration of the question of mootness. See, *e.g.*, *United States* v. *U.S. West, Inc.*, 516 U.S. 1155 (1996); *Sylvester* v. *Bryant*, 516 U.S. 1105 (1996); *MCI Telecomms. Corp.* v. *Credit Builders of Am.*, 508 U.S. 957 (1993); *Continental Cas. Co.* v. *Fibreboard Corp.*, 506 U.S. 948 (1992); *Dep't of Transp.* v. *Air Transp. Ass'n of Am.*, 498 U.S. 1077 (1991). If some further development renders the case non-moot, the Ninth Circuit will be in a position to account for that fact and reinstate its judgment if appropriate. See, *e.g.*, *MCI Telecomms. Corp.* v. *Credit Builders of Am.*, 2 F.3d 103, 103 (CA5 1993) ("The Supreme Court granted certiorari, vacated our decision, and remanded the case with instructions [to] 'consider the question of mootness.' After considering this issue, we conclude that the controversy is not moot, and reinstate our previous opinion."), *on remand from MCI Telecomms.*, *supra*.

CONCLUSION

For the foregoing reasons, the judgment should be vacated and the case remanded for the court of appeals to consider whether the case is moot.

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[1] The mere possibility of later reversal does not, of course, render the case non-moot. See *Bd. of License Comm'rs* v. *Pastore*, 469 U.S. 238, 240 (1985) (per curiam) ("[S]peculative contingencies afford no basis for our passing on the substantive issues [the petitioner] would have us decide.") (internal quotations and citations omitted).

Respectfully submitted,

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